STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellant,

v

KEVIN KAVANAUGH,
Defendant-Appellee

Supreme Court No.: 156408
Court of Appeals No.: 330359
Lower Court No.: 2014-004247-FH

DEFENDANT-APPELLEE KEVIN KAVANAUGH'S SUPPLEMENTAL BRIEF IN OPPOSITION TO THE GOVERNMENT'S APPLICATION FOR LEAVE TO APPEAL

AND

STIPULATION REGARDING APPENDIX

(ORAL ARGUMENT REQUESTED)

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STIPULATION REGARDING APPENDIX

For purposes of this court's consideration of whether leave should be granted, Appellee stipulates to the use of the Appendix filed by the appellant.

ARGUMENT

The question before the court is whether leave should be granted. It should not. There is no error in the opinion of the Court of Appeals that merits any action by this court. In the end, the Court of Appeals concluded that the officer "was never able to articulate any specific inferences of possible criminal activity," and that the trial court's findings were clearly erroneous.[1] Because of the lack of legal errors and because of the determination that the trial court's findings were clearly erroneous, leave is not merited.

I. WHAT DEFERENCE SHOULD BE ACCORDED TO THE TRIAL COURT'S FACTUAL FINDINGS WHERE A RECORDING OF EVENTS UNDER CONSIDERATION IS AVAILABLE TO AN APPELLATE COURT

Because the Court of Appeals gave the proper deference, this court does not need to grant leave to determine what deference "should" be given.[2] This court carefully considered the deference to be given trial courts in *Beason*,[3] and the deference the Court of Appeals granted the trial court was consistent with principles stated previously stated by this court.

In *Beason,* this court noted the "historical" position was that the trial court had superior position to evaluate the evidence. *Beason* at 799. The court in *Beason* began its analysis with the suggestion that, "it is impossible and perhaps unwise to articulate a bright-line standard of review..." *Beason* at 800. While the Michigan Court Rules recognize that the trial court generally has a superior opportunity to determine factual

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[1] Appendix 313a, text of opinion preceding the reference to footnote 16, and Appendix 312a, footnote 12.

[2] To the extent leave is granted, the arguments of Appellant and the PAAM amicus seem misplaced, and the views of the CDAM amicus seem appropriate.

[3] *Beason v Beason*, 435 Mich 791; 460 NW2d 207 (1990)

questions, and that the trial court's factual determinations are entitled to due regard,[4] *Beason* cited *United States v United States Gypsum Co*, 333 US 364, 394-395; 68 S Ct 525; 92 L Ed 746 (1948) and recognized that opinion mentioned that, "[the findings of the trial court] were never conclusive, however." *Id* at 395.

Trial court is "***usually*** in a superior position to appraise and weigh the evidence."[5] Of course, "usually" does not mean ***always***. *Beason* also states that where there are two permissible views of the evidence, the fact-finder's choice between them cannot be clearly erroneous.[6] Here, there are not two permissible views, and indeed, the Court of Appeals (in a somewhat delicate manner) questioned the trial court judge's ability to even make an accurate assessment of the credibility of witnesses.[7] As such, the basis for rule stated in MCR 2.613(C) fails to support the conclusions of Appellant or the amicus of PAAM. Because the trial court's account of the evidence is not plausible,(even if this court adopted the position of Appellant and PAAM), the rule that a finding which is unsupported by substantial evidence must be reversed would still apply.[8] And applying this rule would support affirming the Court of Appeals (or denying leave).

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[4] MCR 2.613(C).

[5] (Emphasis added) *Beason*, supra, citing *Zenith Radio Corp v Hazeltine Research*, 395 US 100, 123; 89 S Ct 1562; 23 L Ed 2d 129 (1969).

[6] *Beason*, at 803, citing *Anderson v Bessemer City*, 470 US 564, 573-574; 105 S Ct 1504; 84 L Ed 2d 518 (1985).

[7] The Court of Appeals stated, "The disparity between the officer's testimony and the events recorded on the videotape, particularly as it concerns the officer's testimony about defendant's nervousness, also raises questions about the trial court's finding that the officer was credible." (Appendix 312a, footnote 12)

[8] See *Beason*, footnote 6, citing *Jones v Pitt Co Bd of Ed*, 528 F2d 414, 418 (CA 4, 1975) and *Williams v Procunier*, 735 F2d 875, 878 (CA 5, 1984), cert den 469 US 1075 (1984)

It would seem that Appellant and the PAAM amicus would have this court fall into the trap of insulating findings from review by merely denominating them credibility determinations. As explained in *Beason* at page 804, quoting *Anderson*:

> This is not to suggest that the trial judge may insulate his findings from review by denominating them credibility determinations, for factors other than demeanor and inflection go into the decision whether or not to believe a witness. Documents or objective evidence may contradict the witness' story; or the story itself may be so internally inconsistent or implausible on its face that a reasonable fact-finder would not credit it. Where such factors are present, the court of appeals may well find clear error even in a finding purportedly based on a credibility determination. [*Anderson*, supra at 575.]

Further, where a finding is derived from an erroneous application of law to facts, the appellate court is not limited to review for clear error. *Beason* at 805. Nor is an appellate court so limited where the trial judge's factual findings may have been influenced by an incorrect view of the law.[9] As such, even under the *Anderson* test (which is based on the analysis of the federal Rule 52(a), not Michigan law), a finding of the trial court contradicted by extrinsic evidence *can* be disturbed. *Anderson*, 470 U. S. at 575.

But again, the question before the court is whether leave should be granted. It should not. There is no error in the opinion of the Court of Appeals that merits any action by this court. Where the traditional foundations for deference are absent, giving the trial court's factual determinations "due regard" may mean giving those determinations little, if any, weight.

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[9] *Id.*, citing *Pavlides v Galveston Yacht Basin, Inc*, 727 F2d 330, 339, n 16 (CA 5, 1984); *Weissmann v Freeman*, 868 F2d 1313, 1317 (CA 2, 1989), cert den 493 US —; 110 S Ct 219; 107 L Ed 2d 173 (1989). *Chaparral Resources, Inc v Monsanto Co*, 849 F2d 1286, 1289 (CA 10, 1988).

II. WHAT EVIDENCE MAY BE CONSIDERED IN DETERMINING WHETHER THERE WAS CLEAR ERROR IN THE TRIAL COURT'S FACTUAL FINDINGS

The arguments of the Appellant and the amicus briefs offered by CDAM and PAAM seem to lack any specific arguments as to the limits of what evidence may be considered. Appellee is not aware of any specific limitations imposed by other courts, and it is unclear to Appellee as to controversies in the present matter that relate to this issue. Accordingly, leave is not merited.

However, if a trial court refused to received video evidence offered, that would certainly seem to be error to Appellee. To the extent that the trial court refuses to carefully consider evidence admitted, that would likewise seem to be reversible error. To the extent the trial court fails to carefully consider all of the evidence, again, the traditional foundations for deference would be absent or eroded, and giving the trial court's factual determinations "due regard" might mean giving those determinations little, if any, weight on review.

III. WHAT STANDARD OF REVIEW IS TO BE APPLIED UNDER SUCH CIRCUMSTANCES

Where a trial court fails to meet the obligations[10] that form the basis for a deferential standard of review, "due regard" might mean something akin to *de novo* review. Likewise, where the trial court demonstrates the inability to make an accurate assessment of the credibility of witnesses or some other evidence, "due regard" might mean something akin to *de novo* review. Because the Court of Appeals followed

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[10] For example, not receiving evidence that should have been received and considered, or not considering evidence that is actually admitted. In such cases, because the trial court did not perform the roll that would normally earn the trial court deference, there is no reason to grant deference.

Michigan law in this regard, leave is not merited. The Court of Appeals found the trial court to be clearly erroneous. Here, the trial court's assessment was given "due regard."

CONCLUSION and RELIEF REQUESTED

Only if this court is inclined to adopt a rule more restrictive than the traditional notions of appellate review should leave be granted.[11] The Court of Appeals opinion is consistent with Michigan law. The Court of Appeals declared no new rules. Only if this court wants to completely tie the hands of the appellate courts, precluding virtually any meaningful review, should leave be granted.

WHEREFORE Defendant-Appellant requests this Honorable Court to deny the application for leave, and to dismiss the charges against Defendant, along with any such additional relief this court deems just.

Respectfully submitted,
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[11] While it might be more clear to simply adopt the position stated in the amicus of CDAM, a position Appellee supports, the more narrow question here is whether leave should be granted. Unless the Court of Appeals is in error, and Appellee says it is not, perhaps leave should not be granted merely to adopt the superior position as stated in the CDAM amicus. It would be appropriate for this court to allow the Court of Appeals time to consider various circumstances and if and when panel issues an opinion that merits review, or if a conflict between panels arose, leave could be granted.